

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 27, 2001 Session

HEIDI JEAN BROOKS v. WILLIAM WALL BROOKS

**Appeal from the Chancery Court for Anderson County
No. 00CH0410 William E. Lantrip, Chancellor**

FILED OCTOBER 9, 2001

No. E2001-00590-COA-R3-CV

After twenty-four years of marriage, Heidi Jean Brooks (“Wife”) sought a divorce from her husband, William Wall Brooks (“Husband”), on the grounds of inappropriate marital conduct and indignities. *See* Tenn. Code Ann. §§ 36-4-101(11)-(12). After hearing testimony at trial and upon Husband’s motion, the Trial Court dismissed Wife’s Complaint for Absolute Divorce, holding that Wife did not sustain her burden of proof to warrant an award of divorce. Wife appeals. We affirm.

**Tenn. R. App. P. 3; Judgment of the Chancery Court Affirmed;
Case Remanded.**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HOUSTON M. GODDARD, P.J., and CHARLES D. SUSANO, JR., J., joined.

Vivian L. Crandall, Oak Ridge, Tennessee, for the Appellant, Heidi Jean Brooks.

Robert W. Wilkinson, Oak Ridge, Tennessee, for the Appellee, William Wall Brooks.

OPINION

Background

The parties have been married since 1976 and have two children, both 18 years old or older. At the time of trial in January 2001, Wife was 45 years old and Husband was 53 years old. Prior to their separation in 2000, the parties resided in Oak Ridge, Tennessee. At the time of trial, Husband was the owner and sole employee of a franchise business which cleans and refurbishes waste dumpsters. Husband's business is located in Lebanon, Tennessee. Previously, Husband was employed as a bi-vocational minister and also had various secular jobs. The proof in the record shows that over the course of the parties' marriage, Husband's jobs frequently required him to travel away from the family for weeks and months at a time. One of Husband's jobs caused him to be gone for approximately one year. In 1999, Husband began to live in Lebanon during his work week, returning home to Oak Ridge on the weekends. At the time of trial, Wife was enrolled as a full-time student in a massage therapy program, was employed part-time as a private nurse, and occasionally worked as a housekeeper.

In May 2000, Wife filed a Complaint for Absolute Divorce ("Complaint") alleging the grounds of adultery, irreconcilable differences, inappropriate marital conduct, and indignities. *See* Tenn. Code Ann. §§ 36-4-101(3), (11), (12) & (14). Prior to filing her Complaint, Wife obtained a Restraining Order and an Order of Protection regarding Husband's contact with Wife and his treatment of the parties' assets and debts. Husband filed an Answer denying Wife's alleged grounds for divorce.

Wife testified the parties' marriage began to break down during the fall of 1999. Wife also testified that Husband's moods toward her began to vacillate when he was home in Oak Ridge on the weekends. In December 1999, Wife asked Husband if he would be there for her if she was diagnosed with cancer. Husband responded that he did not know. Thereafter, Husband and the parties' two children took a trip to Arizona for a University of Tennessee football game. Husband did not ask Wife if she wanted to go with the rest of the family to this game. In addition, Wife testified she was unsettled by Husband's increased interest in sex with Wife. Wife testified that previously, Husband had told her that she was fat and sexually unattractive.

In early January 2000, without first telling Husband, Wife withdrew approximately \$65,000 from the parties' savings accounts. Wife purchased a new vehicle for \$26,000, deposited over \$30,000 into her personal money market and checking accounts, and hired her divorce attorney. The proof in the record shows that the parties had previously set aside this sum of money for their taxes, a vehicle, and their daughter's college expenses. The proof shows that later that year, Wife purchased a harp for approximately \$1,000, an instrument which she does not know how to play. By the time of trial in January 2001, Wife had only \$700 left from the \$65,000 she had withdrawn a year earlier.

A few days later, Wife traveled out-of-state to visit her sister and while there, called Husband to tell him she wanted a divorce. Husband testified this was the first time Wife brought up the topic of divorce with him. Nevertheless, after Wife returned to Oak Ridge, the parties saw a marriage counselor in an attempt to work toward reconciling.

Two months later, in March 2000, while the marriage counselor was in the parties' home, Husband stated he did not want to live any longer and got a gun and bullets out of the parties' bedroom. Wife testified she became very scared because she was not sure on whom Husband would use the gun. Wife was able to secure the gun from Husband, and no one was physically injured.

During that same month, the parties, apparently without the assistance of counsel, executed a hand-written post-nuptial agreement. In the post-nuptial agreement, the parties agreed upon the division of marital assets and alimony. Husband agreed to take a polygraph test while Wife agreed to "limited counseling of her choice." Both parties agree they entered into this agreement to work toward saving their marriage. Wife testified the agreement also was a precautionary measure, to avoid costly litigation, just in case of a divorce.

The following month, April 2000, Wife and Husband were together in the parties' Oak Ridge home when Wife found a notebook of Husband's that contained photocopies of Wife's notes regarding her withdrawals and purchases in January 2000. Husband kept financial documents in this notebook and used it regularly in his business. Wife took the notebook over Husband's protests. In Husband's effort to obtain the notebook from Wife, the parties physically struggled. Wife testified that Husband pushed her down to the floor, while Husband testified that Wife sat down on the floor while holding the notebook close to her chest. Wife testified that her nightgown was ripped in this incident and that she fled in fear to a neighbor's home. This incident precipitated Wife's request for an Order of Protection and a Restraining Order. It appears from the record that Husband and Wife ceased living together after the Order of Protection and Restraining Order were obtained.

Wife testified she became suspicious Husband was engaged in adulterous relationships after she had a dream about it and after Husband began showing increased interest in sex. Wife also consulted psychics regarding her suspicions. These psychics confirmed Wife's suspicions. Wife hired two people to investigate Husband's activities while he was in Lebanon. These investigations turned up no evidence of any adulterous relationship.¹ Moreover, Wife testified she smelled perfume in Husband's work truck, but Husband testified that Wife only smelled the odor of paint that he used in his business. Wife even took a lock of Husband's hair and reported to him

¹ The proof in the record shows that one of the people Wife hired to investigate Husband's activities was George Hines, a man she met over the internet, who is discussed later in this opinion. Wife admitted Hines was not a private investigator.

that she was taking the hair for a DNA test to determine whether Husband had fathered an illegitimate child.² Husband denied ever having an adulterous affair and attempted several times to prove to Wife that her suspicions were unfounded by, among other things, agreeing to the DNA test and to a polygraph test in the parties' post-nuptial agreement.³

Wife also testified Husband was very demeaning to her throughout their marriage. In addition to the remarks he made to Wife about her weight and sexual unattractiveness, Husband was very controlling regarding the parties' finances and told Wife that she was incapable of handling their financial matters. Wife essentially handed over her paycheck to Husband and claimed that Husband placed both of them on an allowance of five dollars per week which later was increased to ten dollars per week. Wife also testified that Husband tightly controlled the thermostat for heating and cooling and would limit the water consumption by limiting the number of times that the toilet could be flushed. In addition, Wife testified that the family had to buy all of their clothes at thrift stores and yard sales and that the family was limited to eating out to one time per month. Husband denied that he was the only party in the relationship who wanted to live on a budget and that Wife carried the parties' checkbook in her purse and had a credit card.

The proof in the record also shows that Wife met another man, George Hines, a resident of another state, over the internet sometime near the end of 1999. While on a trip with the parties' daughter to the Chicago area, Wife and Hines stayed in the same hotel in separate rooms reserved in Hines' name. In addition, the proof in the record shows that, in 2000, Wife placed a down payment on two wedding bands from an Oak Ridge jeweler. Wife testified she had secured the wedding bands for Hines' son as a favor to Hines since the wedding bands were on sale. At trial, Wife denied having a romantic relationship with Hines or any future plans for one.

After hearing the testimony at trial and upon Husband's motion, the Trial Court dismissed Wife's Complaint. In its Order Dismissing Complaint ("Order"), the Trial Court held that Wife "failed to sustain her burden to prove that [Husband] is guilty of either adultery or inappropriate marital conduct." The Order does not contain any specific findings of fact. The transcript of the trial shows that the Trial Court, in granting Husband's motion to dismiss, stated "I've heard the testimony. I've seen the witnesses. I observed their credibility. And I don't believe that [Wife] has carried the burden of proof to show that there exists grounds for divorce under the statute of the State of Tennessee."⁴

² Wife testified, however, that her real purpose for the DNA test was to determine whether Husband was on drugs. The test result was negative for drugs.

³ Wife testified at trial that Husband's offer to undergo a polygraph test did not quell her suspicions because she knew that Husband could "beat" the test.

⁴ The Trial Court also held Husband in contempt of court for an outburst during the trial and fined him \$50.00.

Discussion

On appeal and although not stated exactly as such, Wife contends that the Trial Court erred in dismissing her Complaint because it erroneously held Wife failed to prove her stated grounds for divorce, inappropriate marital conduct and indignities. Although Wife alleges four grounds for divorce in her Complaint, Wife states in her brief on appeal that the irreconcilable differences ground was moot and that she conceded at trial she was not pursuing the ground of adultery. Wife, therefore, claims on appeal that only the two remaining alleged grounds for divorce were before the Trial Court: (1) inappropriate marital conduct; and (2) indignities. The Trial Court, however, apparently believed that the ground of adultery was at issue since, as discussed, it held in its Order that Wife failed to establish this ground. Husband raises no other issues on appeal.

Our review is *de novo* upon the record, accompanied by a presumption of correctness of the findings of fact of the Trial Court, unless the preponderance of the evidence is otherwise. Tenn. Rule App. P. 13(d); *Alexander v. Inman*, 974 S.W.2d 689, 692 (Tenn. 1998). In this matter, however, the Trial Court made no specific findings of fact in dismissing Wife's Complaint either in its Order or from the bench at trial. Consequently, "there [is] nothing found as a fact which we may presume correct [,] . . ." and "we must conduct our own independent review of the record to determine where the preponderance of the evidence lies." *Brooks v. Brooks*, 992 S.W.2d 403, 405 (Tenn. 1999). With respect to the Trial Court's conclusions of law, the review is *de novo* with no presumption of correctness. *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

In this state, grounds for divorce and defenses thereto are statutory. *Chastain v. Chastain*, 559 S.W.2d 933, 934 (Tenn. 1977). Tenn. Code Ann. §§ 36-4-101 (1)-(15) sets forth the grounds for divorce, and provides, pertinent to this matter, as follows:

The following are causes of divorce from the bonds of matrimony:

(11) The husband or wife is guilty of such cruel and inhuman treatment or conduct towards the spouse as renders cohabitation unsafe and improper which may also be referred to in pleadings as inappropriate marital conduct;

(12) Husband or wife has offered such indignities to the spouse's person as to render the spouse's position intolerable, and thereby forced the spouse to withdraw

This Court discussed the divorce ground of inappropriate marital conduct provided by Tenn. Code Ann. § 36-4-101(11), in *Flanagan v. Flanagan*, No. 03A01-9612-GS-00404, 1997 WL 360566 (Tenn. Ct. App. June 30, 1997) *no appl. perm. app. filed*, holding as follows:

Cruel and inhuman treatment is often times not evidenced by public assaults and beatings, but is accomplished in more subtle and insidious ways. The whispered invective, accusation by insinuation, stinging sarcasm and heartless intimidation are the implements frequently used by which love, the vital principle which animates a marriage, is tortured to death; with the result that the once happy joinder becomes nothing less than a “bridge of groans across a stream of tears.”

Id., at * 1 (quoting *Newberry v. Newberry*, 493 S.W.2d 99, 101 (Tenn. Ct. App. 1973)).

This Court went on to recognize the importance of credibility of witnesses in determining whether an award of divorce is warranted on this ground:

The existence of such continuous refined cruelty can best be determined by the trier of the facts who has seen the parties face to face and who has observed their manner and demeanor as well as that of their respective witnesses. In such matters, the Trial Judge’s judgment as to credibility of witnesses should not be overturned unless the clear preponderance of the evidence is to the contrary.

Id. (quoting *Newberry v. Newberry*, 493 S.W.2d at 101).

The Trial Court held, in its Order, that Wife “failed to sustain her burden to prove that Husband is guilty of . . . inappropriate marital conduct.” It is apparent from the Trial Court’s dismissal of Wife’s Complaint and its remarks in the trial transcript that between the parties, the Trial Court found Husband to be the more credible witness. The Trial Court, as the trier of fact and as the court which observed the parties’ manner and demeanor, is in the best position to determine whether the conduct of a defendant in a divorce action amounts to inappropriate marital conduct. *Id.* Moreover, the Trial Court’s assessment of the parties’ credibility is accorded deference by this Court, and this Court “will not re-evaluate a trial judge’s assessment of witness credibility absent clear and convincing evidence to the contrary.” *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999).

On appeal, Wife, in support of her argument that she established Husband’s conduct amounted to inappropriate marital conduct, cites *Earls v. Earls*, 42 S.W.2d 877 (Tenn. Ct. App. 2000). Wife’s reliance on *Earls v. Earls*, however, is misplaced because the facts of *Earls* are readily distinguishable from this matter. This Court found in *Earls v. Earls* that the parties “had been separated for ten months with no effort or intention to rekindle their relationship.” *Earls v. Earls*, 42 S.W.2d at 884. By contrast, the proof in the record on appeal shows that the parties were attempting reconciliation as late as March 2000. Moreover, Husband disputes Wife’s grounds for divorce and testified about his efforts to save their marriage. Accordingly, we hold that Wife did not meet her burden of proving “evidence of continued misconduct by one or both spouses that makes

continued cohabitation unacceptable.” *Id.* at 883. Therefore, based upon our independent review of the record before us and the deference which we must give the Trial Court’s determinations of credibility, we find no error in the Trial Court’s decision that Wife failed to prove that Husband’s conduct amounted to inappropriate marital conduct.

We next review the Trial Court’s determination that Wife failed to establish her second alleged grounds for divorce found at Tenn. Code Ann. § 36-4-101(12), the “indignities” ground. On appeal, Wife cited very few cases which interpret this particular statutory ground for divorce, and we have been unable to locate many more. Most recently, this Court in *Burkhart v. Burkhart*, M1999-02332-COA-R3-CV, 2000 WL 1231371 (Tenn. Ct. App. Aug. 31, 2000), *no perm. appl. app. filed*, held that false allegations of adultery constituted “indignities.” *Id.*, at * 4 (citing *Cadle v. Cadle*, 191 S.W.2d 561, 562 (Tenn. Ct. App. 1945)); *see also Lyle v. Lyle*, 6 S.W.878, 879-880 (Tenn. 1888) (finding that an award of divorce on this ground was warranted where the defendant falsely accused wife of adultery, called wife a liar and was physically violent toward wife).

According to the facts and circumstances presented to us by the record on appeal, we hold that the Trial Court did not err in determining that Wife failed to establish the “indignities” ground for divorce.⁵ We acknowledge that the “indignities” statutory ground for divorce has been interpreted to include physical violence and that the proof contained in the record on appeal shows that the parties engaged in a physical struggle over Husband’s notebook. *See id.* We also are aware, however, that the parties’ testimony regarding how Wife ended up on the floor is conflicting. The Trial Court obviously found Husband’s testimony more credible than Wife’s rendition of their physical struggle, and as discussed, we must give deference to the Trial Court’s determinations of credibility. *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d at 783. Accordingly, we affirm the Trial Court’s dismissal of Wife’s Complaint as Wife failed to establish either of her two stated grounds for divorce as outlined in Tenn. Code Ann. §§ 36-4-101(11)-(12).

Conclusion

The judgment of the Trial Court is affirmed and this cause is remanded to the Trial Court for such further proceedings as may be required, if any, consistent with this Opinion, and for collection of the costs below. The costs on appeal are assessed against the Appellant, Heidi Jean Brooks, and her surety.

D. MICHAEL SWINEY, JUDGE

⁵ The record shows that Husband did not falsely accuse Wife of adultery but rather that Wife accused Husband of this and even went so far as to accuse Husband of fathering an illegitimate child, all without any proof.